STATE OF MICHIGAN

COURT OF APPEALS

CASTLE VENTURES INC,

Plaintiff-Appellant,

v

MICHIGAN ASSOCIATION OF POLICE – 911, d/b/a MICHIGAN ASSOCIATION OF POLICE,

Defendant-Appellee.

UNPUBLISHED
June 3, 2003

No. 236489
Oakland Circuit Court
LC No. 01-030131-CK

Before: Markey, P.J., and White and Zahra, JJ.

MARKEY, P. J. (*dissenting*)

I respectfully dissent and would affirm the trial court.

Plaintiff first argues that the solicitation contract at issue in this case was not part of another action initiated between the same parties and involving the same claims; thus, summary disposition pursuant to MCR 2.116(C)(6) was improper. A motion brought under MCR 2.116(C)(6) may be granted on the ground that "[a]nother action has been initiated between the same parties involving the same claim." *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999). "MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action." *Id*. at 545. The purpose of the rule is to preclude parties from being harassed by new lawsuits brought by the same plaintiff involving the same questions as those existing in pending litigation. *Id*. at 546, quoting *Chapple v Nat'l Hardwood Co*, 234 Mich 296, 298; 207 NW 888 (1926); *Rowry v Univ of Michigan*, 441 Mich 1, 20-21; 490 NW2d 305 (1992) (Riley, J., concurring). To apply, the initial suit must still be pending at the time of the decision regarding the motion for summary disposition. *Fast Air, Inc, supra* at 549.

After reviewing this matter, I conclude, contrary to plaintiff's assertion, that the two lawsuits involved the same parties and are based on the "same or substantially the same cause of action."[1] *Id*. at 545, n 1; see, also, *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983). Although the instant action filed in 2001 involves a different contract, the

[1] I note that the record reveals that the 1998 action was still pending at the time of the decision regarding the motion for summary disposition. *Fast Air, Inc, supra* at 549. The trial court decided both matters at the June 20, 2001 motion hearing.

claims in this case and the 1998 action were substantially similar and arose out of the same failed business dealing between the parties. The solicitation contract is essentially identical to the contract at issue in the 1998 action, and the two actions involve the same factual and legal claims. "MCR 2.116(C)(6) does not require that all the parties and all the issues be identical." *Fast Air, Inc, supra* at 545, n 1. Hence, I find plaintiff's argument to be without merit.

Further, although plaintiff argues that defendant was required to object pursuant to MCR 2.203(A)(2)[2] and that failure to object constituted a waiver of the joinder rule, plaintiff fails to recognize that defendants are not required to actively seek to have a plaintiff's claims joined under MCR 2.203(A), but rather it is the plaintiff's responsibility pursuant to MCR 2.203(A)(1) to join every claim that the pleader has against that opposing party that arises out of the same transaction or occurrence that is the subject matter of the action. A defendant's obligation is simply to object to the failure to join in a pleading, by motion, or at a pretrial conference. MCR 2.203(A)(2). In this case, defendant states that it objected on the first day of the arbitration hearing, which it refers to as a "pretrial conference." Defendant further states that it never raised the issue of nonjoinder of the solicitation contract because plaintiff did not raise the issue of damages for the alleged breach of the solicitation contract until the first day of the arbitration hearing. Under these circumstances, I conclude that defendant adequately objected to plaintiff's failure to join its claims.

However, even if defendant failed to properly object under MCR 2.203(A)(2), I believe that plaintiff and the majority fail to recognize that subsection (2) also states that "[t]his rule does not affect collateral estoppel or the prohibition against relitigation of a claim under a different theory."[3] This is precisely what has occurred in this case. With this language, the failure to object to nonjoinder where there is collateral estoppel or relitigation of a claim under a different theory does not remove the plaintiff from the constraints of compulsory joinder under MCR 2.203(A)(1). *Bd of Co Rd Comm'rs for Co of Eaton v Schultz*, 205 Mich App 371, 380, n 5; 521 NW2d 847 (1994). Plaintiff does not dispute that the portion of the contract at issue in this action is virtually identical to the one in dispute in the 1998 action. I believe that plaintiff's reliance on the waiver provision of MCR 2.203(A) is without merit in this case.

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[2] Plaintiff is asserting on appeal that the former version of the court rule applies and that the application of the amended version would be unjust. I am assuming that the former version of MCR 2.203(A) is applicable in this case. The amended court rule that became effective on June 1, 1999 deleted subsection (2) pertaining to defendant's obligation to object to a plaintiff's failure to join claims. The former text of MCR 2.203(A)(1) did not change in the 1999 amendment. Under the amended rule, plaintiff would have no argument relating to defendant waiving the joinder rule because of defendant's failure to object.

[3] In its reply brief submitted on appeal, plaintiff argues that defendant has waived its res judicata assertion because defendant did not argue the issue before the trial court. This argument is unavailing. Both the res judicata doctrine and MCR 2.203(A)(1), the joinder rule, are similar doctrines because both limit a plaintiff's ability to split a cause of action. *Rogers v Colonial Federal Savings & Loan Ass'n of Grosse Pointe Woods*, 405 Mich 607, 618; 275 NW2d 499 (1979); *Bergeron v Busch*, 228 Mich App 618, 622; 579 NW2d 124 (1998). MCR 2.203(A)(1) is grounded on the same policy considerations as the res judicata doctrine. *Rogers, supra.*

Plaintiff also argues that its attempt to amend its complaint in the 1998 action to include the solicitation contract did not preclude it from bringing the present action. I also find this argument to be without merit. First, the trial court did not conclude that plaintiff's motion to amend barred it from bringing the present action. Further, plaintiff's argument regarding this issue simply duplicates the same arguments that were presented with respect to MCR 2.203(A) and defendant's failure to object. For these reasons, I would affirm.

/s/ Jane E. Markey